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BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERS

2006 NOV 21 A 10: 54

JEFF HATCH-MILLER, Chairman

WILLIAM A. MUNDELL

MIKE GLEASON

KRISTIN K. MAYES

BARRY WONG

AZ CORP COMMISSION
DOCUMENT CONTROL

In the matter of:

Docket No. S-20478A-06-0565

BELIEVING IN JESUS INVESTMENTS, LLC,
an Arizona limited liability company
7861 West Brown Street
Peoria, AZ 85345

PHOEBUS VINCENT SMITH (a/k/a Vince
Smith and/or Mr. Vince)
7861 West Brown Street
Peoria, AZ 85345

SHARON ELIZABETH GOVAN (a/k/a Sharron
E. Govan-Smith, Sharon Smith, and/or Ms.
Sharon)
7861 West Brown Street
Peoria, AZ 85345

Respondents.

**SECURITIES DIVISION'S RESPONSE
TO RESPONDENTS' FIRST (1st)
REQUEST FOR PRODUCTION OF
DOCUMENTS AND FIRST (1st) SET OF
INTERROGATORIES**

Arizona Corporation Commission

DOCKETED

NOV 21 2006

DOCKETED BY

The Securities Division of the Arizona Corporation Commission ("Division") hereby responds to the First Request for Production of Documents ("Production Request") and First Set of Interrogatories ("Interrogatories") submitted by Respondents in connection with the above-captioned matter. In short, the Production Request and Interrogatories fall well outside acceptable discovery limits as permitted for administrative proceedings under both the Arizona Revised Statutes and Arizona Rules of Practice and Procedure before the Corporation Commission. Accordingly, the Division has no alternative but to reject the demands included in this submission. The Division will, of course, comply with appropriate discovery requests that comport with the prescribed discovery rules for administrative adjudications.

DISCUSSION

Discovery rules in administrative actions are not subject to the whims of individual litigants. To the contrary, the rules and procedures for conducting discovery in administrative proceedings are explicitly provided under Arizona statute and through local administrative agency rules. Only by adhering to these provisions can parties to an administrative adjudication participate in an acceptable, effective and cooperative disclosure process.

1. ***Discovery is available for Administrative Proceedings within Arizona, but only within the limits as defined by statute and agency rule***

Courts have often had occasion to consider the limits of discovery in administrative proceedings. Through these deliberations, two salient points have become evident. The first of these is the fact that, because they derive from an entirely distinct process, the rules of civil procedure for discovery **do not** apply in administrative proceedings.¹ See, e.g., *Pacific Gas and Elec. Co.*, 746 F.2d 1383, 1387 (9th Cir. 1984); *Silverman v. Commodity Futures Trading Comm'n*, 549 F.2d. 28, 33 (7th Cir. 1977); *NLRB v. Vapor Blast Mfg. Co.*, 287 F.2d 402, 407 (7th Cir. 1961).

The second of these points is that the authority to pursue discovery during the course of an administrative proceeding is not conferred as a matter of right. In fact, courts have repeatedly recognized that there simply is no basic constitutional right to pretrial discovery in administrative proceedings. *Silverman*, 549 F.2d. at 33 (7th Cir. 1977). The federal Administrative Procedures Act echoes this point by offering no provision for pretrial discovery during the administrative process. 1 Davis, *Administrative Law Treatise* (1958), § 8.15, p. 588.

¹ This principle is particularly important from a policy standpoint. Indeed, merging civil discovery rules into the administrative arena would have many deleterious results, including: (1) allowing respondents to access confidential investigative information far removed from the witnesses and exhibits relevant to the active case against them; (2) allowing respondents to protract the proceedings indefinitely; (3) allowing respondents to excessively consume scarce but vital resources better expended on other matters necessary for the protection of the public; and (4) allowing respondents to force the agency into the position of a civil litigant rather than into its proper role as a governmental regulatory authority.

1 In accordance with these findings, discovery within the confines of an administrative
 2 proceeding is only authorized to the extent that it is explicitly provided for in a separate statute or
 3 rule. *See, e.g., 73A C.J.S. Public Administrative Law and Procedure*, § 124 (1983) (“Insofar as the
 4 proceedings of a state administrative body are concerned, only the methods of discovery set forth
 5 by the pertinent statute are available, and the methods not set forth therein are excluded”); *See*
 6 *also 2 Am.Jur.2d. Administrative Law* § 327 (2d. ed. 1994) (In the context of administrative law,
 7 any right to discovery is grounded in the procedural rules of the particular administrative agency).

8 Following these precepts, the state of Arizona has enacted both statutes and agency rules to
 9 address the issue of discovery in the context of administrative proceedings. Indeed, both the
 10 Arizona Revised Statutes and the Arizona Rules of Practice and Procedure before the Corporation
 11 Commission (“Rules of Practice and Procedure”) contain explicit provisions addressing discovery
 12 procedures in contested administrative adjudications. Only by observing these controlling provisions
 13 can a party effectively pursue discovery in an administrative matter before the Arizona Corporation
 14 Commission.

15 The statute setting forth the parameters of discovery in administrative proceedings is, not
 16 surprisingly, found in the chapter on Administrative Procedure, A.R.S. § 41-1001, *et seq.* Under
 17 Article 6 of this chapter, covering “Adjudicative Proceedings,” Arizona law provides as follows:

18 *A.R.S. § 41-1062: Hearings; evidence; official notice; power to require testimony and*
 19 *records; Rehearing*

20 A. Unless otherwise provided by law, in contested cases the following shall apply:

21 ...

- 22 4. The officer presiding at the hearing may cause to be issued
 23 subpoenas for the attendance of witnesses and for the production of
 24 books, records, documents and other evidence and shall have the
 25 power to administer oaths.... *Prehearing depositions and*
 26 *subpoenas for the production of documents may be ordered by the*
officer presiding at the hearing, provided that the party seeking
such discovery demonstrates that the party has reasonable need of
the deposition testimony or materials being sought....
Notwithstanding the provisions of section 12-2212, no subpoenas,
depositions or other discovery shall be permitted in contested

cases except as provided by agency rule or this paragraph.

(Emphasis added). The plain import of this provision is that, in Arizona, the only forms of pre-trial discovery permitted in administrative proceedings are (1) subpoenas, based on a showing of need and authorized by the administrative hearing officer; (2) depositions, based on a showing of need and authorized by authorized by the hearing officer; and (3) any other discovery provision specifically authorized under the individual agency's rules of practice and procedure.

The Rules of Practice and Procedure, R14-3-101, *et seq.*, thus serve to augment the available means of pre-trial discovery within the Corporation Commission. Under these rules, the presiding administrative law judge may also direct a pre-hearing conference wherein an arrangement is made for the exchange of proposed exhibits, witness lists, or prepared expert testimony. *See* A.A.C. R-14-3-108(A). These rules also provide that a party may gain access to additional pre-hearing materials by way of a discretionary administrative law judge order requiring that the parties interchange copies of exhibits prior to hearing. *See* A.A.C. R-14-3-109(L). Indeed, Corporation Commission administrative law judges often call upon these rules in ordering parties to file a list of witnesses and exhibit at a time and date in advance of the hearing, thereby facilitating the hearing preparation process.

The aforementioned provisions establish that only certain, specified methods of discovery are sanctioned in administrative proceedings before the Arizona Corporation Commission, and that such methods of discovery are often both limited and discretionary. The discovery Request filed by Respondents in this instance utterly fails to acknowledge or operate within this discovery framework.

2. The Arizona rules and procedures governing discovery for administrative proceedings comport with the principles of due process.

As previously addressed, *supra*, there is simply no constitutional right to discovery in administrative proceedings. Nor does the Constitution require that a respondent in an administrative proceeding be aware of all evidence, information and leads to which opposing counsel might have access. *Pet v. Dep't of Health Serv.*, 207 Conn. 346, 542 A.2d 672 (1988)

1 quoting *Federal Trade Comm'n v. Anderson*, 631 F.2d 741, 748 (D.C.Cir. 1979); *Cash v. Indus.*
2 *Comm'n of Arizona*, 27 Ariz. App. 526, 556 P.2d 827 (App. 1976). Despite this, the concept of due
3 process is still germane to the procedures of governmental actions such as the administrative
4 proceeding at issue. As the Supreme Court noted in *Willner v. Comm. on Character and Fitness*,
5 373 U.S. 96, 107 (1963), a respondent must be adequately informed of the evidence against him
6 and be afforded an adequate opportunity to rebut this evidence. A denial of pre-hearing
7 depositions is not a denial of due process because respondent had ample opportunity to cross-
8 examine the witnesses at a full hearing. *Electomec Design & Dev. Co. v. NLRB*, 409 F.2d 631 (9th
9 Cir. 1969).

10 Courts have since had occasion to consider what types of procedures do in fact comply
11 with due process in the context of administrative proceedings. It is now well-settled that
12 procedures designed to ensure "rudimentary requirements of fair play" are sufficient to meet the
13 due process requirements in administrative adjudications. *Mitchell v. Delaware Alcoholic*
14 *Beverage Control Comm'n*, 193 A.2d 294, 313 (Del.Super. 1963), *rev'd on other grounds*, 196
15 A.2d 410 (Del.Super. 1963); *see also Matthews v. Eldridge*, 424 U.S. 319, 333 (1976), quoting
16 *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)("the fundamental requirement of due process is the
17 opportunity to be heard at a meaningful time and in a meaningful manner"); *Swift & Co. v. U.S.*,
18 308 F.2d 849, 851 (7th Cir. 1962)("due process in an administrative proceeding, of course, includes
19 a fair trial, conducted in accordance with fundamental principles of fair play and applicable
20 procedural standards established by law"); 73A C.J.S. *Public Administrative Law and Procedure*,
21 § 60 (1983); *see also Adamchek v. Board of Educ.*, 387 A.2d. 556 (Conn. 1978)(although the
22 Uniform Administrative Procedures Act does not expressly provide for pre-trial discovery, the
23 procedures required for the UAPA still exceed the minimal procedural safeguards mandated by the
24 due process clause).

25 Petitioners have often sought to challenge this due process standard for administrative
26 proceedings. For instance, in *Cimarusti v. Superior Court*, 79 Cal.App.4th 799, 94 Cal.Rptr.2d

1 336 (2000), a petitioner argued that his due process rights were compromised through the lower
2 court's curtailment of his discovery requests. The court rejected this claim, reasoning that the pre-
3 hearing discovery and hearing procedures as provided under the state's Administrative Procedures
4 Act fully satisfied the petitioner's due process rights. Similarly, in *Silverman*, 549 F.2d 28, a
5 petitioner argued that he was denied due process in connection with the prehearing production of
6 documents by the CTFC. In noting that the petitioner received copies of all proposed exhibits, a
7 list of all proposed witnesses, the identity of the government employees who had investigated the
8 case, and copies of memoranda reflecting petitioner's own statements to administrative
9 representatives, the court ruled that the proceedings did not involve a denial of due process.
10 Responding to a similar appeal, a Texas court found that due process in administrative proceedings
11 mandates notice, a hearing, and an impartial trier of facts, but not various methods of discovery.
12 *Huntsville Mem'l Hosp. v. Ernst*, 763 S.W.2d 856, 859 (Tex.App. 1988).

13 These cases demonstrate that, in order to comport with procedural due process in the
14 context of an administrative proceeding, an agency need only enforce the guidelines of applicable
15 administrative statutes and rules while using the discretion inherent in these guidelines to ensure a
16 level of fundamental fairness. See *Pacific Gas and Elec. Co. v. Federal Energy Regulatory*
17 *Comm'n*, 746 F.2d 1383 (9th Cir. 1984)(If an agency has adopted rules providing for discovery in
18 its proceedings, **the agency is bound by those rules** and must ensure that its procedures meet due
19 process requirements)(*emphasis added*). It follows that the Arizona statutes and agency rules'
20 governing discovery procedure in administrative proceedings are more than adequate in satisfying
21 any due process concerns.

22
23 3. ***Attempts to invoke the Civil Discovery Rules in this administrative forum are misplaced and unsustainable.***

24 As previously discussed, the extent of discovery to which a party to an administrative
25 proceeding is entitled is primarily determined by the particular agency; the rules of civil procedure
26 are inapplicable. See, e.g., *Pacific Gas and Elec. Co.*, 746 F.2d at 1387; see also *LTV Steel Co. v.*

1 *Indus. Comm'n*, 748 N.E.2d 1176 (Ohio 2000) (discovery as generally provided by the rules of
2 civil procedure in court proceedings is not available in administrative proceedings). This point is
3 particularly obvious in light of the fact that the Arizona legislature and Corporation Commission
4 have enacted and adopted specific statutes and rules, respectively, to govern discovery procedure
5 in this administrative forum. *See* A.R.S. § 41-1001, *et seq.* (Rules of Practice and Procedure
6 Before the Corporation Commission).

7 Despite these explicit rules on discovery, Respondents are attempting to use the civil
8 discovery rules set forth in the Arizona Rules of Civil Procedure in this administrative proceeding.
9 The Respondents appear to rely on Rule 14-3-101(A) of the Rules of Practice and Procedure to
10 justify their position on discovery. In pertinent part, this provision states: "In all cases in which
11 procedure is set forth *neither by law, nor by these rules, nor by regulations or order of the*
12 *Commission*, the Rules of Civil Procedure for the Superior Court of Arizona as established by the
13 Supreme Court of Arizona shall govern." (Emphasis added). However, this catch-all provision
14 provides a secondary procedural resource only *where there is nothing in the law or rules governing*
15 *a particular procedure.*² As has been pointed out at great length above, however, there is already
16 plenty of governing authority with respect to discovery procedure in administrative proceedings
17 within Arizona. Indeed, both laws **and** rules explicitly outline the proper discovery procedures for
18 administrative proceedings in this state. As such, there is neither need nor justification to charge
19 into the civil rules of procedure for guidance on discovery.

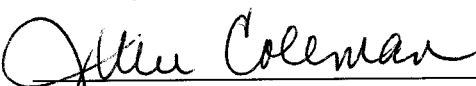
20 CONCLUSION

21 The discovery rules for contested administrative proceedings in this state are expressly
22 provided by statute and agency rule, and that the principles of due process are amply preserved
23 within these rules. As a consequence, discovery requests predicated on inapplicable rules of civil
24 procedure are misplaced in this administrative forum. It follows that the Division is neither

25
26 ² Note that this Commission rule references different types of *procedures* (e.g. "service," "time
computation," "motion practice", etc.), and not just specific "discovery procedures."

1 inclined nor obligated to comply with Respondents' civil procedure-based "Request for Production
2 of Documents." The Division will, of course, comply with future discovery requests that are not
3 objectionable and comport with applicable law. Likewise, the Division will, at the appropriate
4 time, produce a complete list of witnesses and exhibits, thereby enabling Respondents both to
5 examine the evidence against them and to formulate an adequate defense to such evidence.

6 RESPECTFULLY SUBMITTED this 21st day of November, 2006.

7 By: 
8 Julie Coleman
9 Assistant Chief Counsel of Enforcement for
the Securities Division of the Arizona
Corporation Commission

10 ORIGINAL AND THIRTEEN (13) COPIES of the foregoing
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